

**38 CFR Parts 38 and 39****RIN 2900-AQ28****Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves****AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its regulations regarding the provision of Government-furnished headstones, markers, and medallions to eligible individuals. These revisions clarify eligibility for headstones, markers, or medallions, establish replacement criteria for such headstones, markers, and medallions consistent with VA policy, define the term “unmarked grave” consistent with VA policy, and generally reorganize and simplify current regulatory language for ease of understanding.

DATES: The final rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Artis L. Parker, Executive Director, Office of Field Programs, National Cemetery Administration (NCA), Department of Veterans Affairs, 4850 Lemay Ferry Road, Suite 205, St. Louis, MO 63129. Telephone: 314-416-6304 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In a document published on February 6, 2019 (84 FR 2093), VA proposed revising its regulations governing the provision of Government headstones, markers, and medallions to eligible individuals. The public comment period ended on April 8, 2019. VA received 66 comments from interested individuals, which we address in categories below.

Introductory matters

In the proposed rule, VA specifically requested public comments on proposed 38 CFR 38.630(b)(3)(i)(E)(1), which would allow VA to replace existing Government-furnished headstones and markers to correct factual information provided to VA as part of the initial application process. As VA was not part of the application process until 1973, we noted in the preamble to this proposed rule that this provision would not apply to Government-furnished headstones or markers provided prior to 1973. VA received no comments about this provision. Therefore, VA makes no changes to this provision.

VA also received no comments on the proposed reorganization of a large portion of current Part 38 regulations. The new regulatory framework is reflected in the following chart:

Current regulation	Location of applicable provisions in the final regulation
§ 38.600(a)(1)	§ 38.630(c)(1)
§ 38.600(a)(2)	§ 38.631(c)(1)
§ 38.600(b)	§ 38.600(a)(1)-(a)(9)
§ 38.630(a) and (b)	§ 38.630(b)(2) and § 38.631(b)(2)
§ 38.630(c)	§ 38.631(a) and (b)(2)(i)-(ii)
§ 38.630(c)(1)	§ 38.631(a)
§ 38.630(c)(1)(i)-(iii)	§ 38.631(a)(1)(i)-(iii)
§ 38.630(c)(2)	§ 38.631(c)(2)
§ 38.630(c)(3)(i)-(ii)	§ 38.361(a)(1)(i)-(ii)
§ 38.631(a)	§ 38.630(a)(2)(i) and (b)(1)(iii)(B)
§ 38.631(b)(1)	§ 38.630(a)(2)(ii)(A)
§ 38.361(b)(2)	§ 38.630(a)(2)(i)
§ 38.631(b)(3)	§ 38.630(a)(2)(i)(A)-(F)
§ 38.631(c) and (d)	§ 38.630(b)(4)(i) § 38.631(b)(4)
§ 38.631(e)	§ 38.630(b)(1)(iii)(C)
§ 38.631(f)	§ 38.630(b)(2)(ii)
§ 38.632(a)	§ 38.630(b)(1) § 38.631(b)(1) § 38.632(a)
§ 38.632(b)	§ 38.632(b)
§ 38.632(c)	§ 38.630(b)(1) § 38.631(b)(1)
§ 38.632(d)	§ 38.632(c)
§ 38.632(e)	§ 38.632(d)

§ 38.632(f)	§ 38.632(e)
§ 38.632(g)	§ 38.632(f)
§ 38.632(h)	§ 38.632(g)

Similarly, VA received no comments on proposed § 38.620(j), which proposed to add burial eligibility criteria for a group of individuals to reflect statutory changes that were made by Public Law 115-141. That Public Law amended 38 U.S.C. 2402(a) to establish eligibility for certain individuals naturalized pursuant to the Hmong Veterans' Naturalization Act of 2000 (Pub. L. 106-207)—those who served on behalf of the United States during the Vietnam War and who were residing in the United States at the time of the individual's death, which must have occurred on or after March 23, 2018, the effective date of the law. However, upon review, the pertinent public laws do not render spouses and surviving spouses of these Hmong fighters eligible for burial or memorialization. To align our previous proposal to public law, this final rule does not include the proposed inclusion of the phrase “or spouses of such individuals” in § 38.630(a)(1)(ii)(F) and (a)(2)(i)(F). Because this change merely brings the regulation in conformance with the statutory authority, it is unnecessary to solicit public comment on the change.

On December 31, 2018, before the proposed rule was published in the *Federal Register*, the President signed Public Law 115-407, which revised 38 U.S.C. 2306 and 2402(a)(5). Section 201 of the public law authorized VA to extend certain burial benefits to eligible spouses and dependents buried in a Tribal Veterans' cemetery. Section 202 of the public law authorized VA to extend certain burial benefits and national cemetery interment to eligible spouses and dependents of active duty Servicemembers serving under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the spouse's or dependent's death that occurs prior to October 1, 2024.

To reflect these new statutory authorities, this final rule amends VA's regulation on burial eligibility, § 38.620, by adding paragraph (k) to authorize VA to inter the spouse, minor child, and unmarried adult child of a member of the Armed Forces serving on active duty under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the spouse's or child's death if it occurs before October 1, 2024. The definitions of minor child and unmarried adult child provided in § 38.620(e)(2) and (3) will apply to this paragraph. The statutory changes are also reflected in amendments to § 38.630(a)(1)(iv) for burial headstones and markers and § 38.631(a)(1) for memorial headstones and markers, which extend eligibility to spouses and dependent children covered by Public Law 115-407.

General comments

Regarding the comments received, only two specifically noted support for the rulemaking. One commenter expressed general support for the proposed rule that recognizes the sacrifice of the men and women who served. A second commenter expressed specific support for the provisions regarding durability of headstones and requested that VA update Form 40-1330 to reflect these changes. We discuss the need for changes to Form 40-1330 below, in the section regarding the Paperwork Reduction Act. We thank these commenters for their support and input.

Although other commenters generally expressed negative opinions about the rulemaking, including suggesting that VA should abandon the effort, many of them did not specify ways in which VA should change any particular proposed provision or suggest an overall change to the rule, short of withdrawing it. We thank all the commenters who took time to submit comments on the proposed rule; however, without more information regarding the changes certain commenters would like to see or the

provisions with which they take exception, we cannot respond except to say that VA believes the rule is necessary and provides needed guidance to the public regarding its headstone and marker program.

Two commenters submitted information relating to specific unmarked graves and questioned the application of the rule to these circumstances. One of the commenters provided photographs of existing markings as examples of worn and broken block grave markers. Comments regarding specific claims are beyond the scope of this rulemaking. Because the circumstances regarding each claim for benefits are unique, and VA assesses claims on a case-by-case basis, we cannot speculate on the potential merits of the information provided regarding specific claims or potential claims.

Comments that the rule is attempting to alter or is inconsistent with statutory authority

The first category of comments received generally asserted that VA was changing, or at least was being inconsistent with, the statutory authority for the headstone and marker program, as provided by Congress in 38 U.S.C. 2306. Several of these comments asserted that VA must provide headstones and markers for “all soldiers’ graves” or “all veterans’ graves” or just “all graves.” One commenter suggested that VA must provide a headstone to mark “any” grave for “any” veteran of “any” war. Another suggested that VA adopt a “One-Vet-One-Stone” approach and provide a headstone regardless of whether the remains are unmarked or marked. We appreciate the input from these commenters; however, we clarify that our authority is circumscribed by section 2306. That statute prescribes eligibility for a Government headstone or marker depending on the type of individual and type of cemetery at issue. VA assures these commenters, and the public, that VA is not changing or departing from any of the eligibility categories set forth in current 38 U.S.C. 2306; as several commenters pointed out, VA has no authority to change a statutory provision. VA’s responsibility is to provide benefits as authorized by Congress and, where Congress

has left some ambiguity, to implement reasonable regulations consistent with the statute. VA's regulation includes all the categories of individuals who are eligible for headstones, markers, or medallions as established by Congress, including specific criteria for placement where applicable (for example, some individuals may be eligible for a headstone only when buried in a national cemetery).

Several commenters suggested withdrawal of the proposal because it was inconsistent with the normal use of the term "marked." We disagree. Section 2306 authorizes VA to furnish headstones or markers for "unmarked graves"; the common definition of "marked" is "having an identifying mark"; and the common definition of "unmarked" is "not having an identifying mark or distinctive notation." See "Marked" and "Unmarked," *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary> (last visited June 24, 2020). It would contravene these common definitions to consider graves with private, durable headstones containing a legible, identifying notation (even if that notation is simply a name—or even a number that corresponds to a name) as "unmarked."

Several additional commenters stated that the proposed definition of "unmarked grave" is not a reasonable construction of the statutory term and is inconsistent with Congress's intent to "furnish headstones or markers for the graves of all" veterans. S. Rep. No. 80-1453, at 2 (1948). The Senate Report cited in these comments was addressing the bill that would become Public Law 80-871 (1948), 62 Stat. 1215. This public law authorized Government headstones or markers for the "unmarked graves" of Union and Confederate soldiers, the "unmarked graves" of members of the Armed Forces who died in service or whose last service terminated honorably, and "all unmarked graves" in post and national cemeteries. 62 Stat. 1216.

Thus, while the Senate Report spoke in terms of headstones or markers for "all" veterans, S. Rep. 80-1453, at 2, the bill being recommended—and the Act which

Congress passed—consistently restricted the furnishing of Government headstones or makers to “unmarked graves.” See *id.* at 1. Overall, the goal was not to ensure any specific content on the mark—just that all graves be marked. And neither the Senate Report nor the Public Law prescribed or suggested a definition of “unmarked.” As such, the definition of “unmarked” provided in this rule is consistent with the 1948 Congress’s intent, and we make no changes based on these comments.

One commenter stated that veterans of all races and sexes who served in the military have a right to be remembered and honored with a headstone. Because section 2306 does not address race or sex in eligibility criteria, neither does VA’s regulation. VA is committed to providing all of the many burial benefits, including headstones, markers, and medallions, to all persons eligible to receive them, without regard to a person’s race, sex, or any other characteristics that are not enumerated in law.

Another commenter asserted that the proposal reflected an intent to deny headstones to veterans who served prior to World War I and who are interred in cemeteries that keep records of burials. This comment seems to conflate two provisions of the proposed regulation, one regarding a statutorily mandated eligibility date and one addressing when information about a decedent is “ascertainable” from the headstone or marker. We discuss the term “ascertainable” below. As to World War I, we note that this war was not referenced in the proposed rulemaking, but the regulation does contain three references to April 6, 1917, the date on which the United States entered World War I. One of these references, in proposed § 38.630(c)(1)(vi), defines “Applicant” to include any individual if the veteran’s service ended prior to April 6, 1917—so that provision does not exclude veterans who served prior to World War I. The other two references, in proposed § 38.630(a)(2)(ii) and (iii), correspond to statutory references to that date in 38 U.S.C. 2306(d)(4) and (5). We make no changes based on this comment.

We also received a comment that our proposed regulation did not focus on defining headstones, markers, or medallions, but rather on determining “whether a veteran deserves any of those” benefits. The commenter asserted that this allowed VA to establish a “criteria for worthiness.” As indicated above, Congress decides which categories of individuals should receive a headstone or marker. Congress also established, mostly in 38 U.S.C. 101, the definitions that shape these categories, by defining, for example, when service in the military constitutes “active duty” and who may be considered a “veteran” for purposes of VA benefits. VA’s responsibility is to determine whether a decedent meets the requisite criteria before providing a headstone or marker. We do not consider this determination to be an assessment of anyone’s “worth”; it is merely a factual determination whether the decedent meets the criteria.

As noted above, VA received one comment suggesting a one-veteran-one-headstone rule, regardless of placement in a national or private cemetery, and irrespective of whether the remains are marked, unmarked, or on a collective monument. We thank the commenter for giving serious consideration to the issue of marking graves and suggesting an alternative. However, as previously explained, VA’s regulation must remain within the authorities provided by Congress, which currently restrict who is eligible to receive a Government headstone or marker based on the nature of service, the type of cemetery at issue, and whether the grave is “unmarked.” VA makes no changes based on this comment.

Comments that the rule is not consistent with VA practice or will prevent provision of headstones and markers

Several commenters suggested that the content of the proposed rule was “changing” or not consistent with VA’s current or past practice in providing headstones and markers for unmarked graves. Many of the comments urged VA to remove the rulemaking from the docket because the commenters believe it is unnecessary and

would have far-ranging negative effects that would curtail an ordinary citizen's ability to honor and preserve the graves of veterans of all eras. Some commenters predicted dire results, stating that the regulation would result in VA no longer providing "individual" headstones—or any headstones at all—in the future, even if a grave is newly discovered. Several commenters specifically suggested that VA's rule would result in VA never providing a headstone for the grave of anyone who served in the Civil War, whether for the Union or the Confederacy. One commenter noted that several of VA's national cemeteries contain graves of enemy prisoners of war for which VA has provided headstones and stated that VA should show the same respect for "our own American veterans."

While these commenters hypothesized possible effects of the proposed rulemaking, most did not specify the provisions of the proposed rule that would lead to these dire results. As indicated above, without a clear indication of what provision a commenter finds problematic, VA cannot respond as to why VA believes otherwise. We clarify for these commenters, however, that VA will indeed continue to provide headstones and markers for eligible veterans and others as required by section 2306. As to the particular categories that were mentioned, we note that the statute requires VA to provide headstones for "individual[s] buried in a national cemetery," which would include enemy prisoners of war buried in national cemeteries, as well as "[s]oldiers of the Union and Confederate Armies," who are eligible for headstones or markers for their unmarked graves within or outside VA national cemeteries. Both categories of individuals are reflected in the regulation.

To the extent the commenters' apprehension is related to the proposed definition of "unmarked grave," the preamble to the proposed rulemaking addressed this issue. Although the definition had never before been included in VA regulations, the content of the definition is consistent with VA's longstanding policy and guidance in VA

Department of Memorial Affairs Headstone and Marker Manual M40-3, which itself is consistent with Department of the Army regulation (32 CFR 536.57(b)(3) (1961)) and policy predating VA's assumption of responsibility for managing the national cemeteries, and the headstone and marker program, which occurred in 1973. We assure these commenters that the content of the rule is consistent with our current and past practice, despite the possibility that there may have been individual instances of inconsistent application in the past. Publication of the rule will assist in preventing such inconsistencies in the future. We believe that publication of the rule will establish consistency in VA's provision of headstone, marker, and medallion benefits within the scope of its statutory authority.

Finally, to the extent the commenters' concern is that VA will no longer furnish headstones or markers so long as the decedent interred in the grave can be ascertained through research or a cemetery office ledger, that is not the case. If there is no durable headstone or marker at or by the grave, that grave is "unmarked" under this rule, § 38.630(c)(6), and VA would therefore furnish a headstone or marker if eligibility criteria are met. Moreover, if a headstone or marker is damaged beyond repair, lacks a legible inscription that can lead to identification of the decedent, or has been stolen or vandalized, that grave is "unmarked" under this rule, *id.*, and VA would therefore furnish a headstone or marker if eligibility criteria are met. In sum, a cemetery's maintenance of a ledger does not preclude consideration of a grave as "unmarked." That said, where the inscription on a durable headstone or marker, in conjunction with a cemetery ledger or other reasonably accessible source, serves to identify the decedent, the grave is considered "marked" under the proposed rule and this final rule.

Comments on content of inscriptions

Two commenters suggested that graves should be considered “unmarked” if a headstone or marker does not contain a “proper inscription,” including name, rank, and other service information. Others asserted that a number on a headstone, corresponding to a book or list, was not sufficient to mark a grave or honor a veteran. Another stated that the definition of “marked” should be the same regardless of the type of cemetery at issue.

At the outset, it must be noted that VA cannot change a private choice in a private cemetery to place only a name or number on a headstone. While one commenter stated that no “one should ever have to settle for just being a number,” some private purchasers chose and private cemeteries permit such a practice, and VA cannot prohibit it. The critical question, for purposes of VA’s statutory authority to furnish headstones or markers, is whether such a grave is “unmarked.” And in our proposal, we posited a definition of “unmarked” that can be consistently applied, regardless of the type of cemetery at issue.

As discussed in the preamble to the proposed rule, VA considered including as “unmarked” privately purchased headstones that do not meet the minimum inscription criteria that Congress set for an “appropriate marker” in VA national cemeteries at 38 U.S.C. 2404(c). Those minimum criteria are the name of the decedent, the number of the grave, and other information that VA shall prescribe, *id.*, which currently is branch of service and years of birth and death, see VA Form 40-1330 (Inscription Information). However, we continue to reject that alternative, because there is no indication that Congress intended its view of what is “appropriate” for markers in national cemeteries as the barometer for what is marked or “unmarked” in other cemeteries. In other words, Congress’s use of the term “appropriate marker” in section 2404(c) indicates that some graves having a “marker” that is not “appropriate” for a national cemetery are nevertheless marked. In any event, it is incongruous to use section 2404(c)’s definition

of “appropriate marker” under the national cemetery administration program as a definition for “unmarked graves” in the headstone and marker program of section 2306. The predecessor to section 2404(c), for example, required that national cemetery headstones contain the State of the decedent, 24 U.S.C. 279 (1970); but that does not mean that Congress considered a headstone not chronicling a State in a private cemetery as “unmarked.” And VA believes that if Congress were later to determine that the use of nicknames on headstones is not “appropriate” for national cemeteries, that would not mean that a headstone with a nickname in a private cemetery is “unmarked. Although Congress mandated certain information be on headstones in national cemeteries, there is no indication that it intended section 2404(c) to be a definition of “marked.” Accordingly, the rule here focuses the “unmarked” inquiry not on what is “appropriate” for national cemeteries, but on whether there is a durable headstone or marker with a legible inscription that, in conjunction with a cemetery ledger or other reasonably accessible source, serves to identify the decedent. We make no changes based on these comments.

One commenter suggested that VA determine, on a “case by case” basis, whether a grave was marked based on the content of the inscription of an existing headstone or marker. The commenter provided hypothetical examples of the application of this “test.” We appreciate the considerable thought put into the comment and note that VA does undertake some of the analysis suggested when determining whether a Government-furnished headstone or marker should be replaced based on newly discovered information. This is reflected in the rule at § 38.630(b)(3)(E) for burial headstones or markers and § 38.631(b)(3)(E) for memorial headstones or markers. We thank the commenter, but because, as explained above, the content of the inscription is not determinative of whether a grave is considered unmarked, we make no changes based on this comment.

Another commenter interpreted the proposal to mean that, if a headstone were unreadable, but identification could be made through research, VA would not provide a headstone or marker. This is not the case. Under § 38.630(c)(6)(ii)(C), where the identifying elements of an inscription on the headstone or marker are no longer legible, the grave is “unmarked.” The commenter then raised an issue that seems to pertain to whether information is “ascertainable” by citing a lack of services available at some cemeteries, which may make timely identification difficult. While we are sympathetic to this concern, we note again that VA’s mandate is to furnish headstones or markers for the unmarked graves of veterans. We cannot extend our authority to address the lack of customer service provided by private entities by providing a headstone or marker where one already exists. Nevertheless, the definition of “ascertainable” addresses this issue by requiring the decedent’s name to be “reasonably accessible,” which may involve a case-by-case consideration of the availability of the private cemetery’s ledger or other sources.

On a similar note, one commenter argued that a grave is not “marked” if a visitor has to review a cemetery ledger to learn of the decedent’s name. But Congress has authorized VA to furnish headstones or markers for “unmarked graves,” not marked graves lacking certain information. Again, while we are sympathetic to the burden on visitors when a headstone or marker itself conveys little information about a decedent, that does not mean that the grave is “unmarked.”

Comments regarding Confederate headstones and Oakwood Cemetery

Many comments VA received, including several noted previously, were concerned about the application of this rule to the provision of headstones and markers for individuals who served in the Confederate armed forces during the Civil War, and particularly those who are buried in Oakwood Cemetery in Richmond, Virginia. We understand that readers of any rulemaking document will understand its contents

through their own experiences and circumstances. But this rule was drafted to apply to the myriad circumstances, both historic and contemporary, that VA navigates in deciding claims for headstones and markers. The rule provides VA with the flexibility to provide headstones or markers in numerous situations, without dictating how private individuals must mark or should have marked a grave.

Some of these commenters expressed a belief that the rulemaking reflected a political bias against those who served in the Confederate armed forces and is an attempt to limit provision of headstones to mark graves of Confederate soldiers. We affirmatively state that the regulation was not created to advance any political agenda or to deny any group of individuals the benefit to which they are entitled. Consistent with section 2306(a), this rule treats Confederate soldiers the same as Union soldiers and most others eligible for burial in a national cemetery. The regulation will provide VA with a consistent method for determining eligibility for the headstone, marker, and medallion benefits within the scope of its statutory authority. As acknowledged above, to the extent VA's past implementation may have been inconsistent at times, VA intends with this regulation to create a clear and effective method by which the headstone, marker, and medallion program will be managed.

Commenters also asserted that VA's proposal is inconsistent with Public Law 80-871 (1948), because the Senate characterized the bill that would become this Public Law as authorizing Government headstones or markers for "the graves of all persons who served honorably in the armed forces of the United States, including the Union and Confederate Armies." S. Rep. 80-1453, at 2. As stated above, 38 U.S.C. 2306(a)(3) provides eligibility for headstones or markers for individuals who served in the Union and Confederate Armies, and this rule similarly includes them as eligible at § 38.630(a)(1)(iii). We reiterate, however, that, while that part of the Senate report cited by the commenters referred only to "graves," without the "unmarked" qualifier, other

parts of the report—and the public law itself—limited this furnishing to graves (of those who served in the Union and Confederate Armies and all others) that were “unmarked.” This remains the language of the law (in section 2306) today. As noted above, Congress did not provide, in Public Law 80-871 or any other law since, a definition of the term “unmarked.”

At least one commenter asserted that, under the 1948 law, Congress intended that VA provide headstones which display the veteran’s name and other pertinent information. To the contrary, that topic was not addressed in Public Law 80-871. And, as noted above, Congress has never declared that the content on a headstone or marker is the barometer for assessing whether a grave is “unmarked.” Indeed, Congress has strongly suggested that the provision of headstones or markers for already-marked private graves requires specific statutory authority: Congress added paragraph (d) to section 2306, see Pub. L. 107-103, § 502 (2001), with the understanding that “VA is restricted by statute from providing a headstone or marker for an already marked grave” absent Congressional allowance. S. Rep. 107-86, at 23 (2001). Overall, as discussed above, while section 2404 requires that certain information be inscribed on headstones or markers in order to be an “appropriate marker” for graves in national cemeteries, this requirement is not related to VA’s authority to furnish headstones or markers on unmarked graves outside national cemeteries.

Several commenters specifically referenced the effect the regulation may have on VA’s provision of headstones for those interred in Oakwood Cemetery in Richmond, Virginia. One commenter cited to a specific headstone request for placement at Oakwood Cemetery and another commenter cited to legal challenges to VA’s previous denials of claims for headstones for graves in Oakwood’s Confederate section. Other comments stated support for providing headstones at Oakwood. As previously

indicated, we cannot address specific claims within this rulemaking. We also clarify that the effect of this rulemaking is not to address specific gravesites or cemeteries, such as Confederates interred in Oakwood Cemetery. To the extent that the litigation regarding headstones at Oakwood Cemetery informed this regulation, it reinforced the importance of VA publishing a regulation with consistent standards and inviting public comment, to ensure the public is aware of, and able to provide input on, VA's interpretation of its statutory authority. The content of the regulation was not drafted with any intent of addressing specific previous or potential future claims at Oakwood or any other cemetery; as noted above, the regulation was drafted to provide a clear and effective method by which the headstone, marker, and medallion program will be managed in accordance with VA's interpretation of the authority provided by Congress.

One commenter asserted that VA-furnished headstones for Confederates at Oakwood Cemetery are incorrect or duplicative and questioned the accuracy of burial lists for graves at Oakwood. VA appreciates the commenter's concerns; however, these comments are case-specific scenarios or issues that should be raised in the claim adjudication context, and not as part of a rulemaking.

Some of the commenters discussing Oakwood Cemetery referenced a "statement submitted to [the Office of Management and Budget (OMB)] in 2017 by James B. Laidler." We attempted to obtain the full text of Mr. Laidler's 2017 comment that presumably would have been submitted to OMB regarding proposed changes to VA Form 40-1330, Claim for Standard Government Headstone or Marker. We conducted an internal search of files, trying to locate the full content of Mr. Laidler's 2017 comment, but we have no record of having received such comment. Because the commenters indicated it was submitted to OMB, we reviewed the online portal at www.regulations.gov but did not find any comment submitted by Mr. Laidler. Finally, we

also asked OMB if they could provide the comment to us; however, OMB staff informed us that they also had no record of Mr. Laidler's submission.

Without the benefit of reviewing Mr. Laidler's actual comment in full, it is difficult to evaluate the relevance of his input to this regulation specifically. However, we can address the arguments conveyed by the commenters, which allegedly originated from this 2017 submission. The commenters asserted that VA's proposal would rely on a "block-and-ledger" system to determine whether a grave is "unmarked" and that, because all cemeteries use such a system, this would essentially result in VA never providing a Government headstone for any graves. To the extent the commenters are referring to a grave location system that marks sections and rows of graves within a large cemetery, this is indeed a system used in many, if not all, cemeteries, including VA's national cemeteries. However, VA did not propose that a grave is "marked" so long as the cemetery has a system for locating graves. Under the proposed rule and final rule, a grave lacking a durable headstone or marker is "unmarked"; a grave with a damaged, stolen, or vandalized headstone or marker is "unmarked"; and a grave without a legible inscription on a headstone or marker is "unmarked." As explained in the preamble to the proposed rule, this definition is based on VA's long-standing policy, which, in turn, is based on the policy that the Department of the Army had used prior to the transfer of the national cemeteries and the headstone and marker program to VA in 1973. VA makes no change to the regulation based on these comments, including, to the extent it was capable of consideration, Mr. Laidler's 2017 comment.

Clarification and technical edits

One commenter requested clarification as to whether a headstone or marker has to be individualized for the grave to be considered marked, *i.e.*, whether a headstone or marker for "a block of graves or a row of many graves" suffices. Similarly, another stated that a grave should be considered "unmarked" if "no individual marker is present

at the soldier's actual burial site." To clarify VA's position on the matter, if there is a marker for a block or row of graves that serves to identify the decedent (and is durable, not damaged beyond repair, etc.), VA considers the grave to be marked. As noted above, VA has no authority to control how private cemeteries historically chose to mark graves, and the choice to mark multiple graves with one block in proximity to those graves does not render them "unmarked." To the extent the proposed regulatory text was unclear on the matter, we are replacing "at the grave" in proposed § 38.630(c)(6) with "at or by the grave" in final § 38.630(c)(6).

Beyond the changes noted above, VA also makes a few technical edits in this final rule, including the correction of cross-references, addition of medallions to the replacement provisions in § 38.630(b)(3)(ii), and updating statutory citations in § 38.630(c)(4) to reflect renumbering in titles 10 and 14 of the United States Code.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866.

The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rulemaking does not change VA's policy regarding small businesses, does not have an economic impact to individual businesses, and there are no increased or decreased costs to small business entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless

it displays a currently valid Office of Management and Budget (OMB) control number.

See *also* 5 CFR 1320.8(b)(3)(vi).

This final rule will impose the following revised information collection requirement that was previously approved by OMB. Of the 66 public comments received for the proposed rule, VA received no comments on proposed § 38.630(b)(1)(iii)(A)-(C) that revised two existing certification statements on VA Form 40-1330, titled “Claim for Standard Government Headstone or Marker,” related to placement of a headstone or marker in a private or local cemetery and related to following the receiving cemetery’s guidelines and procedures. VA incorporated one change to the form based on a comment to add the text “permanent and durable” to describe graves that are currently marked with a privately purchased headstone or marker. This change merely implements the language in § 38.630(c)(5) that defines a privately purchased, durable headstone or marker as “lasting” and not anticipated to unduly degrade under exposure to the environment in which it is placed. The collection of information is necessary for VA to sufficiently determine that a Government-furnished headstone or marker can be placed in a private or a local government cemetery in close proximity to the grave and in accordance with cemetery guidelines. VA will use this information to ensure proper issuance of the requested headstone or marker. The proposed revisions to the certifications further do not affect eligibility for a headstone, marker, or medallion, and would not increase or decrease the number of applicants using VA Form 40-1330. Therefore, these proposed revisions would not result in any increase or decrease in respondents, respondent burden hours, or respondent burden costs. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit information collection 2900-0222 to OMB for its review and approval on the revised collection.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.201 National Cemeteries; 64.202 Procurement of Headstones and Markers and/or Presidential Memorial Certificates; and, 64.203 Veterans Cemetery Grants Program.

List of Subjects

38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

38 CFR Part 39

Cemeteries, Grant programs-veterans, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on June 23, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts

Regulations Development Coordinator
Office of Regulation Policy & Management
Office of General Counsel
Department of Veterans Affairs

For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR parts 38 and 39 as follows:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

AUTHORITY: 38 U.S.C 107, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Revise § 38.600 to read as follows:

§ 38.600 Definitions.

(a) The following definitions apply to this part:

Appropriate State official means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

Clear and convincing evidence means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

Convicted means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

Federal capital crime means an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.

Interment means the burial of casketed remains or the placement or scattering of cremated remains.

Life imprisonment means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

Memorialization means any action taken to honor the memory of a deceased individual.

Personal representative means a family member or other individual who has identified himself or herself to the National Cemetery Administration as the person

responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual.

State capital crime means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a sentence of imprisonment for life or the death penalty may be imposed.

(b) Other terms not defined in paragraphs (a)(1) through (9) of this section may be defined within and be applicable to other sections throughout this part.

(Authority: 38 U.S.C. 2404, 2411)

3. Amend § 38.620 by adding paragraphs (j) and (k) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(j) Any individual who:

(1) Was naturalized pursuant to section 2(1) of the Hmong Veterans' Naturalization Act of 2000 (Pub. L. 106-207, 114 Stat. 316; 8 U.S.C. 1423 note); and

(2) At the time of the individual's death resided in the United States; and

(3) Died on or after March 23, 2018.

(k) The spouse, minor child, and unmarried adult child of a member of the Armed Forces serving on active duty under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the spouse's or child's death if such death occurs before October 1, 2024. Paragraphs (e)(2) and (3) of this section provide the applicable definitions for "minor child" and "unmarried adult child."

4. Revise § 38.630 to read as follows:

§ 38.630 Burial headstones and markers; medallions.

(a) *Eligibility*—(1) *Unmarked graves*. VA will furnish, when requested under paragraph (b)(1)(i) or (ii) of this section, a burial headstone or marker for the unmarked grave of the following individuals:

(i) Any individual buried in a national cemetery or in a military post cemetery. When more than one individual is buried in a single gravesite in a national cemetery, VA will, if feasible, include inscription information for all such individuals on a single headstone or marker, rather than furnishing a separate headstone or marker for each buried individual.

(ii) The following individuals eligible for burial in a national cemetery but who are buried elsewhere, where such graves may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government such as town or city cemetery):

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force, whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 (10 U.S.C. 12731 *et seq.*), as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Naturalization Act of 2000, as described in and subject to § 38.620(j).

(iii) Soldiers of the Union and Confederate Armies of the Civil War, whose graves may be located in any type of non-national cemetery (*e.g.*, state, tribal, private, or local government cemetery).

(iv) Spouses, surviving spouses, and dependent children, as described in and subject to § 38.620(e) or § 38.620(k), whose graves are located in a veterans' cemetery owned by a State, or a veterans' cemetery owned by a Tribal Organization or on land owned by or held in trust for a Tribal Organization.

(2) *Marked graves.* (i) Subject to paragraphs (a)(2)(ii) and (iii) of this section, VA will furnish, when requested under paragraph (b)(1)(ii) of this section, a burial headstone or marker for the graves of the following individuals who are buried in a non-national cemetery (*e.g.*, state, tribal, private, or local government cemetery), notwithstanding that such graves are already marked by a privately purchased headstone or marker.

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 (10 U.S.C. 12731 *et seq.*), as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Naturalization Act of 2000, as described in and subject to § 38.620(j).

(ii) An individual described in paragraph (a)(2)(i) of this section is eligible for a headstone or marker provided under this paragraph (a)(2) if:

(A) The individual died on or after November 1, 1990; or

(B) They were a Medal of Honor recipient and served in the Armed Forces on or after April 6, 1917.

(iii) In lieu of a headstone or marker provided under this paragraph (a)(2), veterans described in paragraph (a)(2)(i)(A) of this section are eligible for a medallion to be affixed to their privately purchased headstone or marker if they served in the Armed Forces on or after April 6, 1917.

(b) *General—(1) Application.* (i) When burial occurs in a cemetery that uses the National Cemetery Administration (NCA) electronic ordering system (e.g., national cemetery, State veterans' cemetery, or military post cemetery), the headstone or marker provided under paragraph (a)(1) or (2) of this section will be ordered by the applicable cemetery as part of the process of arranging burial.

(ii) When burial occurs in a cemetery that does not use NCA's electronic ordering system (e.g., private or local government cemetery), an applicant, as defined in paragraph (c)(1) of this section, may either:

(A) Request a burial headstone or marker provided under paragraph (a)(1) or (2) of this section by completing and submitting VA Form 40-1330, Claim for Standard Government Headstone or Marker; or

(B) Request a medallion provided under paragraph (a)(2)(iii) of this section to be affixed to a privately purchased headstone or marker, by completing and submitting VA Form 40-1330M, Claim for Government Medallion for Placement in a Private Cemetery.

(iii) VA Forms 40-1330 and 40-1330M include application and submission instructions as well as additional information related to emblems of belief, and are accessible through the following links: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>, and <https://www.va.gov/vaforms/va/pdf/VA40-1330M.pdf>.

(A) An applicant for a burial headstone or marker for an unmarked grave provided under paragraph (a)(1) of this section, for placement in a private cemetery or a local government cemetery, must certify on VA Form 40-1330 that such headstone or marker will be placed on or at the grave for which it is requested.

(B) An applicant for a burial headstone or marker for a marked grave provided under paragraph (a)(2) of this section, for placement in a private cemetery or a local government cemetery, must certify on VA Form 40-1330 that such headstone or marker will be placed on the grave for which it is requested, or if such placement is not possible or practicable, as close as possible to the grave within the grounds of the cemetery in which the grave is located.

(C) A representative of a private cemetery or local government cemetery that accepts delivery of a burial headstone or marker provided under paragraph (a)(1) or (2) of this section must certify on VA Form 40-1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions.* The styles and types of burial headstones and markers provided under paragraphs (a)(1) and (2) of this section, as well as the inscriptions thereon to include an emblem of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c) and 2404(c).

(i) The styles and types of burial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain

requirements, including but not limited to aesthetic or administrative requirements of the cemetery in which the headstone or marker will be placed.

(ii) The same styles and types of headstones and markers made available for selection by requestors of headstones and markers provided for unmarked graves under paragraph (a)(1) of this section shall be made available for requestors of headstones or markers for marked graves provided under paragraph (a)(2) of this section.

(iii) Upon request under paragraph (b)(1)(i) or (ii) of this section, a headstone, marker, or medallion provided under paragraph (a)(1) or (2) of this section shall signify the deceased's status as a Medal of Honor recipient as applicable.

(iv) If an emblem of belief is requested that is not offered in VA's inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement.* (i) Upon request, VA will replace a Government-furnished burial headstone, marker, or medallion, if the previously furnished headstone, marker, or medallion:

(A) Is damaged beyond repair; or

(B) Has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name or a grave number for an unknown decedent), or, in the case of a medallion, no longer serves to identify the buried decedent as a veteran or as a Medal of Honor recipient if applicable; or

(C) Has been stolen or vandalized; or

(D) Is the incorrect style or type for the veteran's era of service; or

(E) Requires changing or adding inscription information for the following reasons:

(1) To correct errors in factual information (such as name or date of birth or death) provided to VA as part of the initial application process; or

(2) To indicate information related to the deceased's military service that is provided to VA after the initial application process (such as the deceased's posthumous receipt of military awards); or

(3) To identify on a single headstone or marker multiple decedents who are each eligible for a headstone or marker and who are buried in the same gravesite in a cemetery, to include identification of a spouse or dependent in accordance with 38 U.S.C. 2306(g)(1); or

(4) To indicate the deceased's status as a Medal of Honor recipient if applicable, for a headstone or marker provided for a marked grave under paragraph (a)(2) of this section, in accordance with 38 U.S.C. 2306(d)(5)(B).

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to change or add inscription information is received from the decedent's next of kin as indicated in NCA's records systems, within six months of the initial headstone or marker being provided.

(ii) To the extent practicable, replacement burial headstones, markers, and medallions will be of the same style and type (to include inscription information) as those headstones, markers, or medallions being replaced, except that style, type, or inscription information may differ for replacements if one of the criteria in paragraph (b)(3)(i)(D) or (E) is the reason for replacement.

(iii) Requests to replace Government-furnished burial headstones, markers, or medallions are made as follows:

(A) Through NCA's electronic ordering systems, when the headstone, marker, or medallion to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40-1330 or VA Form 40-1330M, when the headstone, marker, or medallion to be replaced is located in a cemetery that does not use NCA's electronic ordering systems.

(4) *Limitations.* (i) VA will not pay costs associated with installing a burial headstone or marker provided under paragraph (a)(1) or (2) of this section for placement in a non-national cemetery, but VA will deliver such headstone or marker directly to the non-national cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(ii) VA will not pay costs associated with affixing a medallion provided under paragraph (a)(2) of this section to a privately purchased headstone or marker in a non-national cemetery, but VA will deliver such medallion directly to the applicant.

(5) *Ownership, alteration, and disposition.* (i) All Government-furnished headstones, markers, and medallions remain the property of the United States Government in perpetuity and should not be defaced or altered in any way. Knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (*i.e.*, a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18 of the United States Code.

(iii) When a Government-furnished burial headstone, marker, or medallion is removed from any cemetery, it should be properly disposed. Unless a headstone or marker that has been removed from a cemetery would be maintained by NCA for

historic purposes, or in cases of disinterment would be relocated to a different gravesite, such headstones or markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions*—(1) *Applicant*. An applicant for a burial headstone or marker for an eligible deceased individual, or an applicant for a medallion to be affixed to a privately purchased headstone or marker, may be:

(i) A decedent's family member, which includes the decedent's spouse or individual who was in a legal union as defined in 38 CFR 3.1702(b)(1)(ii) with the decedent; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent;

(ii) A personal representative, as defined in § 38.600(a)(8);

(iii) A representative of a congressionally chartered Veterans Service Organization;

(iv) An individual employed by the relevant state or local government whose official responsibilities include serving veterans and families of veterans, such as a state or county veterans service officer;

(v) Any individual who is responsible, under the laws of the relevant state or locality, for the disposition of the unclaimed remains of the decedent or for other matters relating to the interment or memorialization of the decedent; or

(vi) Any individual, if the dates of service of the veteran to be memorialized, or on whose service the eligibility of another individual for memorialization is based, ended prior to April 6, 1917.

(2) *Ascertainable*. Ascertainable means inscribed on the headstone or marker or discoverable from some inscription on the headstone or marker that corresponds to

information that is reasonably accessible by the public (e.g., a corresponding burial ledger at the cemetery, or publicly available burial information accessible on the internet).

(3) *Local government.* Local government means the administrative body of a geographic area that is not a state, such as a county, city, or town.

(4) *Medal of Honor recipient.* Medal of Honor recipient means an individual who is awarded the Medal of Honor under sec. 7271, 8291, or 9271 of title 10 or sec. 2732 of title 14 of the United States Code, or corresponding predecessor provisions.

(5) *Privately purchased and durable headstone or marker.* Privately purchased and durable headstone or marker means a headstone or marker that was not purchased or provided by the Government, and that is made of a material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed.

(6) *Unmarked grave.* Unmarked grave means a grave in a cemetery where:

(i) A Government-furnished headstone or marker has not been erected or installed at or by the grave, or the condition of a Government-furnished headstone or marker erected or installed at or by the grave warrants replacement under paragraph (b)(3) of this section; and

(ii) A privately purchased and durable headstone or marker, from which the buried individual's name (if known) is ascertainable:

(A) Has not been erected or installed at or by the grave, or

(B) Is damaged beyond repair; or

(C) Has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible); or

(D) Has been stolen or vandalized.

(Authority: 38 U.S.C. 2306, 2402, 2404, sec. 203(b), Pub. L. 110-157, 121 Stat. 1831)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0222.)

5. Revise § 38.361 to read as follows:

§ 38.631 Memorial headstones and markers.

(a) *Eligibility.* (1) VA will furnish, when requested under paragraph (b)(1) of this section, a memorial headstone or marker to commemorate the following individuals whose remains are unavailable:

(i) A veteran (which includes an individual who dies in the active military, naval, or air service), where the headstone or marker may be provided for a national cemetery, a State, local, or private cemetery, a veterans' cemetery owned by a State, or a veterans' cemetery owned by a tribal organization or on land owned by or held in trust for a tribal organization.

(ii) An individual who dies on or after November 11, 1998, who is the spouse or surviving spouse of a veteran (which includes a surviving spouse who had a subsequent remarriage), or the spouse of a member of the Armed Forces serving on active duty under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the spouse's death if such death occurs before October 1, 2024—where the headstone or marker may be provided for a national cemetery, a veterans' cemetery owned by a State, or a veterans' cemetery of a Tribal Organization or on land owned by or held in trust for a Tribal Organization;

(iii) An individual who dies on or after November 11, 1998, who is an eligible dependent child of a veteran, or the eligible dependent child of a member of the Armed Forces serving on active duty under conditions other than dishonorable, as shown by a statement from a general court-martial convening authority, at the time of the child's

death if such death occurs before October 1, 2024—where the headstone or marker may be provided for a national cemetery, a veterans' cemetery owned by a State, or a veterans' cemetery of a Tribal Organization or on land owned by or held in trust for a Tribal Organization—if that dependent child is:

(A) Under the age of 21 years; or

(B) Under the age of 23 years if pursuing a course of instruction at an approved educational institution; or

(C) Unmarried and became permanently physically or mentally disabled and incapable of self-support before reaching the age of 21 years, or before reaching the age of 23 years if pursuing a course of instruction at an approved educational institution.

(2) When VA has furnished a burial headstone or marker under § 38.630(a)(1), VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstones or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(1).

(3) When VA has furnished a memorial headstone or marker under paragraph (a)(1) of this section for purposes of commemorating a veteran or an individual who died in the active military, naval, or air service, VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstones or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(2).

(b) *General—(1) Application.* (i) An applicant, as defined in paragraph (c)(1) of this section, may request a memorial headstone or marker by completing and submitting VA Form 40-1330, Claim for Standard Government Headstone or Marker.

VA Form 40-1330 includes application and submission instructions and is accessible through the following link: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>.

(ii) A representative of a private cemetery or local government cemetery that accepts delivery of a memorial headstone or marker must certify on VA Form 40-1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions.* The styles and types of memorial headstones and markers provided under this section, as well as the inscriptions thereon to include emblems of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c).

(i) The styles and types of memorial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain requirements, including but not limited to aesthetic or administrative requirements of a cemetery.

(ii) All inscriptions for memorial headstones and markers must be preceded by the phrase "In Memory Of".

(iii) If an emblem of belief is requested that is not offered in VA's inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement.* (i) Upon request, VA will replace a Government-furnished memorial headstone or marker, if the previously furnished headstone or marker:

(A) Is damaged beyond repair; or

(B) Has deteriorated to the extent it no longer serves to identify the decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name);
or

(C) Has been stolen or vandalized; or

(D) Is the incorrect style or type for the veteran's era of service; or

(E) Requires changing or adding inscription information for the following reasons:

- (1) The inscription is not preceded by the phrase "In Memory Of"; or
- (2) To correct errors in factual information (such as name or date of birth or death) provided to VA as part of the initial application process; or
- (3) To indicate information related to the deceased's military service that is provided to VA after the initial application process (such as the deceased's posthumous receipt of military awards); or
- (4) To identify a spouse or dependent in accordance with 38 U.S.C. 2306(g)(2); or

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to add or change inscription information is received from the decedent's next of kin as indicated in NCA's records systems, within six months of the headstone or marker initially being provided.

(ii) To the extent practicable, replacement memorial headstones and markers will be of the same style and type (to include inscription information) as those being replaced, except that style, type, or inscription content may differ for replacement headstones and markers if one of the criteria under paragraphs (b)(3)(i)(D) and (E) of this section is the reason for replacement.

(iii) Requests to replace Government-furnished memorial headstones and markers are made as follows:

(A) Through NCA's electronic ordering systems, when the headstone or marker to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40-1330, when the headstone or marker to be replaced is located in a cemetery that does not use NCA's electronic ordering systems.

(4) *Limitations.* VA will not pay the cost of installing a memorial headstone or marker provided under this section for placement in any cemetery that is not a national cemetery but will deliver the headstone or marker directly to such cemetery or to a receiving agent for delivery to the cemetery.

(5) *Ownership, alteration, and disposition.* (i) All Government-furnished memorial headstones and markers remain the property of the United States Government in perpetuity and should not be defaced or altered in any way. Knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (*i.e.*, a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18 of the United States Code.

(iii) When a Government-furnished memorial headstone or marker is removed from any cemetery (due to it warranting replacement under paragraph (b)(3) of this section), it should be properly disposed. Unless a memorial headstone or marker that has been removed from a cemetery would be maintained by NCA for historic purposes, such headstones and markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions*—(1) *Applicant.* An applicant for a memorial headstone or marker, to commemorate an eligible individual under paragraph (a)(1) of this section,

must be a member of the decedent's family, which includes the decedent's spouse or individual who was in a legal union as defined in 38 CFR 3.1702(b)(1)(ii) with the decedent; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent.

(2) *Unavailable remains.* An individual's remains are considered unavailable if they:

- (i) Have not been recovered or identified;
- (ii) Were buried at sea, whether by the individual's own choice or otherwise;
- (iii) Were donated to science; or
- (iv) Were cremated and the ashes scattered without interment of any portion of the ashes.

(Authority: 38 U.S.C. 2306, 2402, 2404)

6. Amend § 38.632 by:

- a. Revising the section heading and paragraph (a);
- b. Removing paragraph (c);
- c. Redesignating paragraphs (d) through (h) as paragraphs (c) through (g), respectively;
- d. Revising newly redesignated paragraphs (c)(1) and (2);
- e. Revising newly redesignated paragraphs (f)(2) and (5) and (g)(1) and (2);
- f. Redesignating newly redesignated paragraphs (g)(3) and (4) as paragraphs (g)(4) and (5), respectively; and
- g. Adding new paragraph (g)(3).

The revisions and addition read as follows:

§ 38.632 Emblems of belief.

(a) *General.* This section contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers.

* * * * *

(c) * * *

If the burial or memorialization of an eligible individual is in a:	The applicant must:
(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system.	(i) Submit a written request to the director of the cemetery where burial is requested indicating that a new emblem of belief is desired for inscription on a Government-furnished headstone or marker; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.
(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery, or a State veterans cemetery that does not use the NCA electronic ordering system.	(i) Submit a completed VA Form 40-1330 to the NCA Director of Memorial Programs Service, indicating in the REMARKS section of the form that a new emblem of belief is desired; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.

* * * * *

(f) * * *

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (d)(1) of this section.

(i) In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. If a factual dispute arises concerning whether the requested emblem represents the sincerely held religious or functionally equivalent belief of the decedent, the Director will evaluate whether the decedent gave

specific instructions regarding the appropriate emblem during his or her life and the Under Secretary will resolve the dispute on that basis.

(ii) In the absence of such instructions, the Under Secretary will resolve the dispute in accordance with the instructions of the decedent's surviving spouse. If the decedent is not survived by a spouse, the Under Secretary will resolve the dispute in accordance with the agreement and written consent of the decedent's living next-of-kin. For purposes of resolving such disputes under this section, next-of-kin means the living person(s) first listed as follows:

(A) The decedent's children 18 years of age or older, or if the decedent does not have children, then

(B) The decedent's parents, or if the decedent has no surviving parents, then

(C) The decedent's siblings.

* * * * *

(5) The emblem meets the technical requirements for inscription specified in paragraph (d)(2) of this section.

(g) *Decision by the Under Secretary for Memorial Affairs.* (1) A decision will be made on all complete applications. A request to inscribe a new emblem on a Government-furnished headstone or marker shall be granted if the Under Secretary for Memorial Affairs finds that the request meets each of the applicable criteria in paragraph (f) of this section. In making that determination, if there is an approximate balance between the positive and negative evidence concerning any fact material to making that determination, the Under Secretary shall give the benefit of the doubt to the applicant. The Under Secretary shall consider the Director of NCA's Office of Field Programs' recommendation and may consider information from any source.

(2) If the Under Secretary for Memorial Affairs determines that allowing the inscription of a particular proposed emblem would adversely affect the dignity and

solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible, or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

(3) Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant's requested alternative is also unacceptable, or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

* * * * *

§ 38.633 [Amended]

7. Amend § 38.633 by removing the last sentence in paragraph (a)(2).

PART 39 – AID FOR THE ESTABLISHMENT, EXPANSION, AND IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS CEMETERIES

9. The authority citation for part 39 continues to read as follows:

AUTHORITY: 38 U.S.C 101, 501, 2408, 2411, 3765.

Subpart A—General Provisions

§ 39.10 [Amended]

10. Amend § 39.10 by removing “38 CFR 38.600(b)” wherever it appears in paragraphs (b)(1) through (3) and adding “38 CFR 38.600(a)” in its place.

